Title
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Raising the Ethical Bar for Tax Lawyers: Why We Need Circular 230

By Dennis J. Ventry Jr.

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This is the first installment of a new column in which Ventry will examine the intersection of tax policy and tax practice, with particular emphasis on the relationship between tax officials, tax policymakers, and tax practitioners.

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I. Introduction

This is the first in a series of nine columns arguing that the failure of the organized bar to promulgate ethical guidelines reflecting the true nature of tax practice has facilitated the market for tax shelters. The reluctance and inability of the organized bar to rein in members participating in aggressive shelter work indicates that self-regulation doesn’t work. Time and again, the organized bar, when faced with the prospect of Treasury regulating tax practice through Circular 230, has said, “Don’t worry, we’ll be fine if left to our own devices.” Time and again, however, the tax shelter lawyers, the “young” lawyers, and the controversy lawyers get more aggressive. While the tax bar appears more committed than the organized bar or the tax shelter bar in preventing overaggressive shelter work, the “tax planning” norms at the heart of the tax bar have historically been overwhelmed by the “tax controversy” norms of the organized bar and the tax shelter bar. Controversy norms have prevented planning norms from informing the organized bar’s ethical standards governing tax practice, even though tax lawyers serve predominately as planners and advisers rather than as litigators and advocates. In the end, a revised Treasury Circular 230 can act as a useful and necessary countervailing force to dominant controversy norms, giving voice to tax planning norms that better reflect the kind of work in which tax lawyers actually engage.

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In 1980 the Treasury Department issued proposed amendments to Circular 230, promulgating for the first time standards for legal opinions used in the promotion of tax shelters. The proposed amendments required opinion writers to conform to standards of practice that exceeded existing ethical standards of the organized bar. In particular, they elevated due diligence requirements to ensure that opinions “fully and fairly disclose” facts affecting each important federal tax issue; that opinions “fully and fairly describe” and state a conclusion as to the likely outcome of each important federal tax issue; and that opinions are “accurately and clearly” described in any discussion of tax considerations in the offering materials. Also, the proposed amendments prohibited opinions that failed to reach a more likely than not conclusion that the bulk of the tax benefits flowing from the shelter were allowable under current law. Thus, practitioners were prevented from issuing negative opinions as well as the industry standard, reasonable basis opinions. Limited scope opinions were restricted, too. Further, tax shelter and tax shelter opinion were defined broadly and required opinion writers to ascertain an investor’s principal reason for participating in the tax shelter offering. That last requirement was particularly onerous given that the new rules applied to nonclient investors, while exempting written advice provided to one’s own client. The 1980 proposed amendments also lowered the mens rea required for prosecuting violations of the new rules, dispensing with the willfulness requirement, and allowing mere negligence or incompetence to be grounds for suspension or disbarment from practice before the IRS.

Practitioners, in a word (or two), freaked out. It is “inherently dangerous” for Treasury to regulate opinion practice on tax matters, the New York State Bar Association cautioned. Conferring on Treasury the power to exercise “draconian regulation of tax lawyers” threatened “our heritage of freedom.” The “rampage” against

2I use “organized bar” to refer to the American Bar Association and state bar associations, and “tax bar” to refer to the ABA Section of Taxation and the New York State Bar Association Tax Section.
3Section 10.33(a)(1).
4Section 10.33 (a)(2).
5Sections 10.51(j) and 10.52.
7For “draconian regulation of tax lawyers,” see John André LeDuc, “The Legislative Response of the 97th Congress to Tax Shelters, the Audit Lottery, and Other Forms of Intentional or Reckless Noncompliance,” Tax Notes, Jan. 31, 1983, p. 363 at 382. For “our heritage and freedom,” see NYSBA Tax Section, supra note 6 at 259.
tax shelters suffered from “dangerous” “legal insufficiency and substantial failings.” 

Treasury should not be in the business of regulating practitioners, the American Bar Association Section of Taxation said. Primary responsibility for the promulgation and enforcement of ethical and disciplinary rules regarding tax practice “should rest with . . . professional associations.” 

The new rules could generate real or perceived conflicts of interest whereby Treasury acted as both prosecutor and judge in tax disputes with taxpayers and in disciplinary proceedings with practitioners. In fact, Treasury’s foray into promulgating disciplinary rules was arguably illegitimate; Treasury was restricted by statute to regulating the “good character” of individuals practicing before it, not the content of legal opinions. 

The new more likely than not standard had nothing to do with the character of the practitioner, and it conflicted with Securities and Exchange Commission requirements mandating tax opinions in public offerings even when the opinion reached an ultimately negative conclusion.

There was nothing to like about the new rules. The tax shelter definition was too broad, as well as too subjective and too vague, and the proposed amendments were overinclusive, capturing plain vanilla tax advice and transactions. They required the practitioner to audit her client to meet the heightened due diligence requirements, and they threatened the attorney-client relationship, creating “a chilling effect on advocacy.” Ultimately, Treasury’s new disciplinary rules would not solve the tax shelter problem. The tax bar warned that the disreputable “tax shelter bar” would not be deterred by the threat of the new rules, shelters would be promoted without tax opinions, and bad tax opinions would be provided by persons who did not practice before the IRS or who were otherwise unaffected by the threat of disbarment from such practice. Circular 230 would make things worse rather than better.

The 2005 amendments to Circular 230 generated similar doom-and-gloom scenarios. In fact, tax practitioners reacted as if the sky were falling. “This is a difficult time for tax lawyers,” Ken Gideon, former Treasury assistant secretary for tax policy and IRS chief counsel, warned. Burgess Raby and William Raby, the latter a former chair of the American Institute of Certified Public Accountants Federal Tax Division, warned that tax practitioners and their clients were “caught up in a paradigm shift” that could alter tax practice as we know it. Similar to the 1980 indictment, the “hue and cry” further charged that the new rules covering formal tax opinions and other written advice were overinclusive; applied to noncontroversial advice and transactions; generated inefficient and unnecessary work, thereby dramatically increasing the cost of tax advice and encouraging clients to invest without independent advice or, worse, to shop around for a favorable opinion; ignored the limits of regulating practitioners as a way to regulate investors and promoters; and disrupted the attorney-client relationship. Taxpayers, tax practitioners, tax officials, and the tax system would be better off if Treasury would abandon its 25-year effort to control the tax shelter market by controlling tax practitioners.

This column will explore the value of Circular 230 by examining Treasury’s first venture into promulgating standards and disciplinary rules regarding tax shelter opinions. The inquiry incorporates not only the 1980 proposed amendments to Circular 230, but also (1) the universe of ethical standards for tax lawyers before 1980, with particular emphasis on ABA’s Formal Opinion 314, issued in 1965; (2) the reconsideration of Opinion 314 in the early 1980s and the publication of Formal Opinion 346 in 1982; (3) the influence of a new penalty regime targeted at tax shelters contained in the Tax Equity and Fiscal Responsibility Act of 1982; (4) the modified proposed amendments to Circular 230 issued in 1982 and the final 1984 regulations; (5) the promulgation of Formal Opinion 85-352 in 1985; and (6) Treasury’s failed attempt to further modify and extend Circular 230 in 1986. Examining those historical episodes provides an opportunity to make broader observations about the role of Circular 230, not just in 1980 or 1984, but also in 2006.

Studying those historical events also provides an opportunity to examine unresolved aspects of the relationship between tax lawyers and the IRS. Those include: (1) the various professional roles of the tax lawyer (adviser and planner, return preparer, IRS practitioner, and advocate and litigator); (2) the multiple and sometimes conflicting duties of the tax lawyer (to client, government, other taxpayers, and self); (3) the view of the IRS as an adversary versus a nonadversary; (4) the use of rules versus standards in attacking tax shelter activity and regulating the conduct of tax practitioners; (5) the efficacy of self-regulation regarding professional member organizations; (6) the resilience of the tax shelter industry; and (7) the appropriate role and ultimate value of Circular 230.

II. Analytical Narratives

Scholars and practitioners have offered several theories to help explain the spate of corporate tax shelter activity in the 1990s and 2000s. Two such theories emphasize sociological and demographic differences among

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10 Id. at 746.

11 Id. at 749-751.


17 Id. at 1311.
A. ‘Young’ vs. ‘Old’ Tax Lawyers

The first theory, articulated most clearly by Prof. Joseph Bankman of Stanford University Law School, explains the proliferation of tax shelters by placing a generational divide between young and old tax lawyers.19 Bankman suggests that the older generation was more purpose-driven when it came to interpreting the IRC and its professional responsibilities under it, while the newer generation was more textualist or formalist.

According to Bankman, the older generation of tax lawyers (defined as those between 45 and 65 years) was comfortable with general standards, and by and large eschewed textualism, which it associated with “long-vanquished formalism.”20 Adopting a purpose-driven approach, that older generation of tax lawyers sought underlying legislative intent, interpreting code provisions, regulations, and legislative history assiduously to glean the “right” result. As George Cooper explained years ago through use of a fictional “Senior Lawyer”: “I used to agonize over an obscure provision until I thought I knew the right interpretation. And I would advise the client accordingly, encouraging him to conduct his affairs so that he would fare well under what I detected to be the probable result, and steering him away from schemes, no matter how alluring their song, that depended on an unsound interpretation.”21

Young lawyers sang all songs, harmonious or discordant. That generation came of age when the practice of law was specialized and rulebound. It embraced the resurgent textualist or formalist approach of jurists espousing a corresponding originalism (both original intent and original meaning). Young tax lawyers pursued any available legal avenue of tax minimization, intended


19Joseph Bankman, “The Business Purpose Doctrine and the Sociology of Tax,” 54 S.M.U. L. Rev. 149, 150 (Winter 2001). Like Bankman, I apologize for those broad generalizations; they “are accurate, if at all, only in the aggregate.” Id. Bankman also included “young versus old” accountants in his sociological explanation. My focus is on lawyers.

20Id.

or unintended. A tax preference, contemplated or not, was Congress’s “misdeed,” not the tax lawyer’s “modest attempt to exploit it.” Those tax lawyers played the audit lottery, while old tax lawyers practiced self-restraint and considered “playing the percentages [as] just dishonest.” The younger generation preferred rules over standards, a preference that, charitably described, reflected a desire to minimize the anxiety caused by not knowing whether a proposed transaction would succeed or fail as well as the inefficient and expensive “dead-weight social loss” associated with trying to figure out the likely application of a murky standard. Uncharitably described, the preference for rules over standards among young tax lawyers comported with a formalist view of statutory interpretation that allowed them to undertake transactions that were technically legal but inequitable in light of the intended purposes of the relevant rules.

Old lawyers recoiled at such amoral instrumentalism. The tax lawyer had a duty beyond “unalloyed avoidance-seeking” and owed “at least a measure of allegiance to the fisc and to higher principle.” Some things were wrong, the older generation believed, even if they worked. Transactions could be legal in a technical sense, but were “not the sort of thing you care to approve as a matter of your personal sense of propriety or conscience.” Similarly, behavior may not be sanctioned by a literal reading of the ethical rules, but it “is the spirit of the professional canons, not their letter, that is all-important.” Line-drawing with rules rather than standards was dangerous. The ultimate question in tax practice, James Eustice reminds us, amounts to where the line is between acceptable tax planning and unacceptable overreaching, and, equally important, how clear that line should be; “bright lines in the tax law have all too frequently been the mother of bright ideas.” Tax shelters, though perhaps on the legal side of the line, Peter Canellos observed, “almost always ignore the underlying purpose of the law.”

Tax lawyers had a duty to uphold, rather than undermine, the underlying purpose of the tax code. They had an obligation “to help make our self-assessing income tax system work.” Randolph Paul argued that, as a “specialty qualified person in one of the most important areas of the public interest” with special qualifications, the tax lawyer had “special responsibilities which may not be passively discharged.” Paul and many of his contemporaries had little patience with “the rusty platitude that taxpayers have a right to avoid taxes if they confine themselves to means that are legal to that end” and believed that such banalities were always “hollow.” Paul also believed that practitioners advocating those self-interested trivialities “have become mental prisoners of the views and interests of clients.” Paul’s aspirational standards were more than quaint. They reminded the tax lawyer that he was charged with higher duties than other lawyers — duties to his professionalism.

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34 Id. at 386-387.
35 Id. at 387.
36 Paul was no dreamy philosopher. He was, in the words of tax historian Joe Thorndike, an “architect of the modern federal tax system.” Joseph F. Thorndike, “Profiles in Tax History: Randolph E. Paul,” Tax Notes, Oct. 25, 2004, p. 529. Paul served as general counsel of the Treasury during World War II; he was a director of the New York Federal Reserve Bank; and he founded the law firm of Paul, Weiss, Rifkin, Wharton & Garrison. Paul was also a prolific scholar, writing on all aspects of the federal tax system. He was an equally passionate advocate for tax reforms that emphasized a comprehensive base. Paul died in 1956 while delivering rousing Senate testimony sharply criticizing President Eisenhower’s supply-side tax and budget policies.
37 At some point, “the tax lawyer had to stop being a tax advisor and become a professional.” Cooper, supra note 21, at 1581. See also Jerome R. Hellerstein, “Ethical Problems in Office Counseling,” supra note 23, at 9.
government,38 other taxpayers,39 and himself.40 Henry Sellin even ventured that there was “a special tax morality” that differed from normal moral concepts.41

Of course, the tax lawyer’s primary duty, as with other lawyers, was to the client. But the tax lawyer’s multiplicity of duties did not necessarily conflict with each other. A tax lawyer’s “undivided fidelity” to the client could be

said to coincide with the duty to the government in that that fidelity included a judicious concern for future transactions of the client and the client’s continuing relationships with tax administrators.42 Those dual roles were better thought of as a concurrent responsibility rather than a “dual system of loyalties to promote the interests of others that are in conflict with the client’s interest.”43 Moreover, the client’s interests were better served by respecting the tax lawyer’s concurrent responsibilities. Clients were “honest innocents,” and the tax lawyer “bears a heavy responsibility . . . for his standards may become the guiding standards for his client.”44 Dishonest clients needed tax lawyers playing multiple roles even more to “beware of competitive pressures. There are always the heathen to beguile him to their temples, and the sirens with their songs. It is necessary to resist the temptation to slant opinions in the direction of a client’s desires.”45 Without the conscience of the tax lawyer, clients, like Odysseus, could find themselves far from home for 10 (to 20) years.46

B. The Tax Bar vs. the Tax Shelter Bar

The second sociological theory that assists in explaining the role of tax lawyers in tax shelter activity involves the distinction between the tax bar and the tax shelter bar. That view, best articulated by practitioner-scholar Canelllos, holds that the two categories of lawyers differ in approach, training, expertise, judgment, reputation, and status.47 They differ most markedly, Canelllos says, “in their attitude toward the issues of substance versus form and business purpose.”48 Tax shelter lawyers, in formulating shelter transactions, “attempt to apply a patina of substance to a transaction that is formal and unreal.”49 To tax bar lawyers, who plan “real” transactions, “the existence of substance is a given and form is usually a

41Sellin, supra note 24, at 585. But see comments of Harry J. Rudick, supra note 23, at 28 (“I find that in this question of morality and ethics in tax practice there are no different problems from those of deciding these questions in other courses of conduct.”); Mark Johnson, “Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government? — The Theory,” 15 S. Cal. Tax Inst. 25 (1963) (arguing for undivided loyalty to the client in tax matters as in all matters); Note, “Ethical Problems and Responsibilities of the Tax Attorney,” 66 W. Va. L. Rev. 111, 115 (1964) (“Generally speaking, the ethical problems facing a tax attorney in dealing with the Service are the same as those of any lawyer dealing with an adversary.”); Bittker, supra note 39, at 1 (“I do not think that ‘professional responsibility’ takes on a wholly distinctive coloration when viewed in the light of federal income tax practice.”); Theodore C. Falk, “Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352,” 39 Tax Law. 643, 663 (1986) (arguing that tax ethics is really the ethics of administrative law and that while some aspects of tax practice are unique, others are not). For a middle ground between tax practice as atypical and tax practice as typical, see Bernard Wolfman and James P. Holden, Ethical Problems in Federal Tax Practice (Charlottesville, Va.: Michie Company, 1985) at 4 (noting that while all lawyers serve dual roles, it is especially so for tax lawyers: “As a vehicle for the study of ethical standards, the tax field is special because it illuminates the importance of role differentiation. No other field so well crystallizes the almost ever-present conflict between the lawyer’s duty to his client and his responsibility to the system.”).
friend to the extent it permits the tax planner to control the tax results of a given substantial transaction by employing one form rather than another. By contrast, to tax shelter lawyers, "form is always a friend and substance always an enemy to be expiated. In a tax shelter, form is malleable because it needs to conform only to tax needs and not business objectives." That reliance on form and minimal acknowledgement of substance among tax shelter lawyers mirrors the formalist approach of young tax lawyers discussed above.

Indeed, the tax bar/tax shelter dichotomy offers other parallels to the old lawyer/young lawyer dichotomy. Tax bar lawyers, like old lawyers, are as comfortable with standards as with rules. They care that the purpose of a transaction reflects the intent of the provisions that comprise the transaction. Tax shelter lawyers and young lawyers, on the other hand, are much more comfortable in a world of rules rather than standards. They care little about whether the transaction reflects legislative or regulatory intent, only that it complies sufficiently with the law to avoid detection long enough to derive positive tax benefits net of prospective interest and penalties. Further, tax bar lawyers and old lawyers advise on transactions, interact with clients, exhibit interpersonal skills, and negotiate as well as analyze. Comparatively, tax shelter lawyers and young lawyers do little advising, rarely meet individually with clients, are infrequently required to display interpersonal skills to sell the product for which they write opinions, and do little negotiating.

C. Tax Planning Norms vs. Tax Controversy Norms

To the two dichotomies, I add a third: tax planning versus tax controversy. Indeed, the history of Circular 230 since 1980 is a history of Gresham’s law in action, whereby controversy norms drive out planning norms. The controversy lawyers squawk the most — or at least controversy norms are invoked the most — when Treasury proposes new rules deeming to regulate tax practice. That seems odd at first. So little of what a tax lawyer does involves controversy work. That may have been less true in 1980, when more tax lawyers were generalists and before the Balkanization of tax practice. But it was true enough for a learned commentator to place litigator/advocate last in a sequence of four roles for the tax lawyer, behind business/tax planner, tax return preparer, and IRS practitioner. Most tax lawyers recognized that they acted as an advocate only when presented with a set of acts that was a fait accompli. That threshold was crossed, if ever, at the litigation stage and perhaps the audit stage of a tax lawyer’s representation of a client.

The tax lawyer’s role vis-à-vis the IRS was unique to the otherwise adversarial process familiar to lawyers. There is something special and peculiar about practicing in the tax field," former IRS Chief Counsel Seymour Mintz observed in 1963. First, Mintz wrote, the self-assessment system would not work in a purely adversary context; second, “you just cannot treat the sovereign in the same way that you would treat an adversary in a purely civil adversary circumstance”; and third, “all the facts are in the taxpayer’s possession and he has to go to some lengths to share them with the Treasury Department.” If a client’s tax dispute reached the audit stage, the tax lawyer had the duty to minimize so far as possible the adversary aspects of the taxpayer-revenue agent relationship. Administrative proceedings were not adversary proceedings, former IRS audit director Dean Baron noted, and “professional people [were] charged with knowing the difference between an administrative process and the judicial process.” Most “reputable practitioners... would agree,” former IRS Commissioner Mortimer Caplin said, “that tax contacts at the administrative level do not parallel a typical adversary proceeding; and that there are certain dual responsibilities here, responsibilities to your client and responsibilities owed to the government.” Moreover, a revenue agent was just an investigator, a finder of the facts. He was hardly your typical adversary. There was an equivocal relationship between the tax lawyer and the IRS, said Mintz, “all the way up, almost until the time you get into the courtroom. There it is truly adversary.”

Once a tax dispute ended up in the courts, it was a different ballgame. At the litigation stage, “it is the general consensus that the tax adviser has only one obligation, to his client. At this point,” Henry Sellin wrote, “he is an advocate whose primary duty is to protect his client’s interests. He is no longer an IRS practitioner, and his only obligation to the Service is that of one litigator to another — to abide by the rules of litigation.” Some commentators argued, however, that even in court, the relationship between the tax lawyer and IRS practitioner, behind business/tax planner, tax return preparer, is in some lengths to share them with the Treasury Department.

(Commentary continued in next column.)
and the IRS was nonadversarial. On one hand, “the obligation of candor and fairness...should be more strict and rigid when it runs to a court...than when it runs to the Treasury which through its representatives of varying attitudes and qualifications is in the equivocal position of investigator, claimant, and administrative judge.” On the other hand, “it may be thought that this obligation of the lawyer should be at least as, if not more, strict and rigid when he is facing the Treasury, the thought here being that a tax matter is not simply a matter between taxpayer and Treasury but between taxpayer and the Treasury and other taxpayers.”

Advocacy rather than high-mindedness won out. ABA Formal Opinion 314, issued in 1965 and still effective today, stated in its opening sentence that the IRS was to be treated as “an adversary party rather than a judicial tribunal.” Moreover, ABA Formal Opinion 85-352, issued 20 years later and designed to elevate the prevailing reasonable basis standard for advising a tax position, considered the IRS an adversary party. In 1985 the ABA Standing Committee on Ethics and Professional Responsibility rejected the recommendation from the ABA Section of Taxation urging it to adopt a nonadversarial view of the IRS. As issued, ABA Formal Opinion 85-352 stated that ethical standards “governing the conduct of a lawyer in advising a client on positions that can be taken in a tax return are not different from those governing a lawyer’s conduct in advising, or taking positions for a client in other civil matters.”

Without the perspective of a tax practitioner — a perspective that may have spoken to the nonadversarial relationship between tax lawyers and the IRS — ABA Formal Opinion 314 promulgated ethical guidelines that paralleled those for all lawyers. The absence of lawyer input does not explain ABA Formal Opinion 85-352. The Standing Committee on Ethics and Professional Responsibility responsible for ABA Formal Opinion 85-352 included two members with tax practice experience, M. Peter Moser and Angus Goetz. Moreover, the committee received the ABA Tax Section’s official report on the revision of ABA Formal Opinion 314 and adoption of ABA Formal Opinion 85-352, which clearly enunciated a nonadversarial view of the IRS. Yet it too summarily dismissed those views, refusing to believe that the practice of tax law was any different than the practice of law generally. Controversy norms dominated the organized bar and prevented planning norms from informing the ethical standards for lawyers, even for tax lawyers who were predominately planners and advisers.

The triumph of controversy norms in the official pronouncements of the ABA regarding tax practice can be partially explained by the historical lack of tax lawyer representation on ABA ethics committees. The Committee on Professional Ethics responsible for ABA Formal Opinion 314 included no tax lawyers.

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64 Darrell, supra note 24, at 38.
65 Id. See also Sellin, supra note 24, at 608 (“It is important to get away from the concept that in tax litigation it is a taxpayer against the government. The reality is that it is one taxpayer against all the other taxpayers.”) (Emphasis in original)); comments of Hugh F. Culverhouse, supra note 39, at 30 (stating that “there is a duty from taxpayers to other taxpayers”).
67 In its official report on the proposed revision of ABA Formal Opinion 314 and adoption of ABA Formal Opinion 85-352, the ABA Tax Section stated, “A tax return is not a submission in an adversary proceeding.” The filing of a tax return “serves primarily a disclosure, reporting, and self-assessment function, and only a relative handful are examined.” Even the initiation of an audit did not qualify as an adversary proceeding unless the IRS departed from its usual procedures requiring revenue agents to maintain impartiality and to adopt neither a pro-government nor a pro-taxpayer view. The relationship could be considered truly adversarial only at the litigation stage. ABA Section of Taxation, “Proposed Revision to Formal Opinion 314” (May 21, 1984), reprinted in Wolfman and Holdren, supra note 41, at 71. In addition to recommending that the ABA adopt a nonadversarial view of the IRS, the ABA Tax Section proposed raising the reasonable basis standard by requiring that for a tax lawyer “to advise a taxpayer to assert a position on a return, the position must be a meritorious one. A position is meritorious if it is advanced in good faith, as evidenced by a practical and realistic possibility of success, if litigated.” ABA Section of Taxation, supra note 41 at 73. The tax bar’s position was far ahead of the organized bar’s. We will revisit those positions in future columns. Recently, Tanina Rostain has examined the tax bar’s similarly vanguard position in the late 1990s and 2000s regarding reforms to curb corporate tax shelters. Rostain believes the position of the tax bar is best understood as an attempt “to reinforce the professional authority of elite tax lawyers, which had been eroded by the tax shelter market.” Rostain offers a “nuanced conception of professionalism...at work” whereby the tax bar, led by elite tax lawyers, staked claim (Footnote continued in next column.)

TAX NOTES, May 15, 2006
We need Circular 230. We need it to make up for inadequate ethical guidelines promulgated by the organized bar. We need it to provide a countervailing force to dominant controversy norms and to give voice to tax planning norms that better reflect the kind of work that tax lawyers actually do. As written, Circular 230 is far from perfect. It arguably burdens legitimate, day-to-day tax practice more than it benefits the government in cracking down on tax shelters.\textsuperscript{73} In its current form, Circular 230 includes mind-numbing rules “entirely directed to the form of tax shelter opinions, not their substance.”\textsuperscript{74} And after burdening tax practitioners with a set of confusing new rules, Treasury has been reluctant to issue guidance easing the burden of interpretation and compliance, offering as a palliative the not-so-helpful suggestion that practitioners just “use common sense.”\textsuperscript{75}

Despite its shortcomings and inadequacies, Circular 230 fills a void created by the organized bar, which has instituted a set of ethical rules conducive to, rather than prohibitive of, tax shelter activity. Also, state bar associations have shown little inclination to discipline members engaged in abusive tax shelter practice. Indeed, although tax shelter enforcement has been stepped up at the state level, state legislatures rather than professional associations have led the attack.\textsuperscript{76} Circular 230 promotes disclosure, a vital component of a successful antishelter effort. Failure to meet the standards in Circular 230 provides penalty exposure to opinion writers as well as their firms. Defective opinions also expose clients to penalties, thereby making shelter investors interested parties in complying with Circular 230’s elevated disclosure standards. Further, the Treasury regulations governing tax practice complement the code’s penalty regime. A legal opinion that complies with Circular 230 satisfies the advice standards in section 6662 in addition to the reasonable cause and good-faith exception in section 6664.

Ultimately, Circular 230 is a necessary piece of the antishelter puzzle. As part of that puzzle, Circular 230 helps reconcile the tax lawyer’s multiple duties to client, government, nonclient taxpayers, and self. At the same time, it reminds the tax lawyer that she is a planner, an adviser, a return preparer, an IRS practitioner, and only rarely an advocate. The history of Circular 230 confirms its importance as well as its necessity.

In the next installment of Policy and Practice: Identifying Tax Shelter Opinion Writers as a Threat to the Tax System in the 1970s.

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\textsuperscript{74}Michael L. Schler, “Ten More Truths About Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach,” 55 Tax L. Rev. 325, 365 (Spring 2002). The rules have become even more form-driven since Schler’s article appeared. Recently, Treasury indicated that it might reformulate Circular 230 opinion requirements away from bright-line rules to general standards similar to ethical standards promulgated by professional organizations. Sheryl Stratton, “IRS Rethinking Opinion Standards While Defending Transparency,” Tax Notes, Mar. 13, 2006, p. 1143.

\textsuperscript{75}Lee A. Sheppard, “Korb Won’t Give In on Circular 230,” Tax Notes, Oct. 24, 2005, p. 432 (quoting IRS Chief Counsel Donald Korb, at a roundtable discussion, “Narrowing the Tax Gap,” at Columbia University Law School). See also “Lawyers, CPAs Urge Treasury, IRS to Revisit Circular 230 Rules,” Tax Notes, Feb. 6, 2006, p. 661 (writing that the “stakes are simply too high for practitioners to assume that everything will be fine so long as they act in ways that comport with ‘common sense’ and ‘reasonableness’”; Kip Dellinger, “Circ. 230, Estate and Gift Practice: The Common Sense Approach,” Tax Notes, Nov. 28, 2005, p. 1197 at 1199 (noting that “representatives of the OPR have repeatedly admonished tax practitioners to use common sense in evaluating, vetting, applying, and implementing the written advice-covered opinion provisions of Circular 230”).